UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

QST ENERGY, INC.,

Plaintiff,

v.

MERVYN'S AND TARGET CORP.,

Defendants.
_____/

No. C-00-1699-MJJ (EDL)

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL DOCUMENTS

On March 5, 2001, QST Energy ("Plaintiff") filed a Motion to Compel Documents in this breach of contract action, seeking production of documents authored by or sent to Ms. Carolyn Kehrein ("Kehrein"), one of Defendants' designated percipient and expert witnesses. See Pl.'s Mot. at 1:8-10.[1] In its Motion to Compel, Plaintiff argued that the documents should be disclosed because they encompass the subject matter of Kehrein's expert testimony. Plaintiff further argued that Defendants waived any privilege or work product protection that may have attached to the documents by designating Kehrein as an expert witness. Mervyn's and Target Corporation ("Defendants") filed an opposition on March 20, 2001, arguing that the documents sought were protected by the attorney client privilege or the work product doctrine because the documents Plaintiff seeks were beyond the scope of Kehrein's expert testimony. Plaintiff replied on April 3, 2001.

On April 17, 2001, the Court conducted a hearing on Plaintiff's motion. Both parties were represented by counsel of record. Upon consideration of the parties' submissions, the argument at the

[1]Specifically, Plaintiff seeks production of Document Nos. 8, 10-12, 16, 25-31, 33-35, 39-41, 44-46, 49-52, 55-59, 63, 66, 67, and 78-157 on Defendants' privilege log. See Pl.'s Mot. at 1:10-12.

hearing, the relevant authorities and the record in this case, and good cause appearing, the Court enters the following order.

FACTUAL BACKGROUND

In 1997, Defendants hired Kehrein as a consultant to prepare and disseminate materials soliciting proposals from companies which supply energy in order to find an energy supplier for Defendants' California stores. See Pl.'s Mot. at 3:9-11. Kehrein was involved in selecting Plaintiff as Defendants' energy supplier and helped negotiate the contracts which are the subject of this suit. See id. at 3:15-17. Kehrein is not an attorney, nor does she have any legal training. See id. at 3:2-3.

On April 1, 1998, Plaintiff began supplying electricity to Defendants. See id. at 3:23-24. In late 1998, Plaintiff submitted invoices to Defendants requesting payments for the electricity provided. See id. at 1:23-25. On January 12, 1999, Defendants informed Plaintiff that due to Plaintiff's desire to terminate the contracts, as well as to disputes concerning the amounts requested on the invoices, Defendants were withholding payments on the received invoices until the disputes were resolved. See Ball Decl. Ex. I. Subsequently, Plaintiff filed this breach of contract action against Defendants, alleging that Defendants failed to pay for electricity that Plaintiff supplied to Defendants. See Pl.'s Mot. at 5:5-7.

On April 5, 1999, Defendants' outside counsel retained Kehrein as a consultant concerning this litigation. See Ball Decl. Ex. J. On November 27, 2000, Defendants' counsel informed Plaintiff that they intended to designate Kehrein as an expert witness in this action. See Rodriguez Decl. ¶ 7. On December 6, 2000, Defendants designated Kehrein as their testifying expert witness on the issue of the "Loss Factor Adjustment." See id. at ¶ 8. Kehrein submitted her Expert Report on December 6, 2000 (see Ball Decl. Ex. U) and her Supplemental Expert Report on February 15, 2001. See Supp'l Ball Decl. Ex. A. Furthermore, on March 27, 2001, Kehrein submitted a Declaration in Support of Defendants' Motion in Limine to Exclude Evidence From QST Regarding "CTC" Credits. See Supp'l Ball Decl. Ex. H.

//

DISCUSSION

1. Timeliness

Defendants claim that Plaintiff's Motion to Compel should be denied as untimely. Motions to compel discovery must be filed no later than ten days after the discovery cut-off date, excluding Saturdays,

Sundays, and legal holidays. See Civil L.R. 26-2. The documents Plaintiff seeks are responsive to a subpoena Plaintiff served on Kehrein on February 2, 2001, during the expert discovery period. See Ball Decl. Ex. V. The cut-off date for expert discovery was February 16, 2001. Due to the President's Day holiday on February 19, 2001, the deadline to file a motion to compel for expert discovery in this action was March 5, 2001. As Plaintiff filed this Motion to Compel on March 5, 2001, its Motion is timely. [2]

2. Attorney-Client Privilege

Under California law, the attorney-client privilege attaches to confidential communications between a client and his attorney during the course of the attorney-client relationship. Cal. Evid. Code § 952 (West 1995); Liew v. Breen, 640 F.2d 1046, 1049 (9th Cir. 1981) (questions of privilege in diversity actions are controlled by the governing state law). The party asserting the attorney-client privilege bears the burden of demonstrating the existence of the privilege. National Steel Prods. Co. v. Superior Court, 164 Cal. App. 3d 476, 483 (1985) (citing D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 729 (1960)). Once the attorney-client relationship has been established, communications between attorney and client are presumed to have been made in confidence, and the opponent of the privilege carries the burden of proving that the communication was not confidential. See id.; Cal. Evid. Code § 917 (West 1995).

Defendants have asserted that the documents that Plaintiff seeks are protected by the attorney-client privilege. Defendants have met their burden of proving that Kehrein and Defendants' in-house counsel, Pat Williams ("Williams") had an attorney-client relationship because Kehrein was Defendants' employee during the relevant time period (see Pl.'s Mot. at 2:28-3:22) and because Williams was acting solely as legal counsel, and not in a business capacity, in her duties as in-house counsel to Defendants. Thus, the attorney-client privilege may attach to Williams' communications. See Williams Decl. ¶ 4; cf. Wellpoint Health Networks, Inc. v. Superior Court, 59 Cal. App. 4th 110, 119 (1997) (where attorney acting in a non-legal capacity, the attorney-client privilege does not apply). Kehrein and Defendants' outside counsel, Tony Rodriguez and Chris Ellison, also had an attorney- client relationship. See State Farm Fire & Cas. Co. v. Taylor, 54 Cal. App. 4th 625, 642 (1997) (attorney-client privilege attached to

[2]For the reasons set forth below, the Court concludes it would have been futile for Plaintiff to file this Motion to Compel before Kehrein was disclosed as an expert because up until that time the documents remained privileged.

certain communications by corporate employee who aided outside counsel in litigation). Accordingly, the communications between Kehrein and Defendants' in-house and outside counsel are presumed confidential.

The burden then shifts to Plaintiff to prove that the communications were not confidential. Cal. Evid. Code § 917 (West 1995). A confidential attorney-client communication includes information that has not been transmitted to any third persons other than those to whom disclosure is reasonably necessary to accomplish the purpose for which the attorney is consulted. Cal. Evid. Code § 952 (West 1995).

Plaintiff argues that Defendants did not maintain the confidentiality of the documents that Plaintiff seeks, as the documents were disclosed to third persons. As indicated on their privilege log, however, Defendants showed the documents only to their counsel and to their employees who were directly involved in the transactions which are the subject of this litigation. See Ball Decl. Ex. R; see also Defs.' Opp'n at 15:11-12. Since these disclosures of the confidential communications to third persons were reasonably necessary to accomplish the purpose for which Defendants' counsel was consulted, they did not waive the privilege. See Insurance Co. of N. Am. v. Superior Court, 108 Cal. App. 3d 758, 771 (1980) (holding that attorney-client communications made in the presence of, or disclosed to, business associates to further the interest of the client remain privileged if they are reasonably necessary to accomplish the purpose for consultation).

The right to claim the attorney-client privilege, however, is waived through sponsoring expert testimony that discloses a significant part of the confidential communications. Cal. Evid. Code § 912 (a) (West 1995); National Steel, 164 Cal. App. 3d at 485 (holding that expert report discoverable when related to the subject matter of the expert's prospective testimony because expert's prospective testimony would disclose a significant portion of the privileged communications to the expert). Where the expert's prospective testimony "will necessarily disclose a 'significant part' of the privileged communication to the expert, the privilege is waived with respect to all communications to that expert." National Steel, 164 Cal. App. 3d at 485.

Defendants acknowledge that they may have waived the attorney-client privilege as to any communications related to the subject matter of Kehrein's expert testimony. See Defs.' Opp'n at 17:17-20. They contend, however, that the documents that Plaintiff seeks to compel are not related to her expert testimony because Kehrein's expert testimony does not involve her own opinions regarding Defendants' damages incurred after the termination of the Retail Power Sales Agreements ("Sales Agreements").

Defendants argue that they designated Clifford Kupperberg ("Kupperberg"), not Kehrein, as their testifying expert on the damages Defendants incurred as a result of Plaintiff's termination of the contracts.

In their Expert Witness List, Defendants summarized the subject of Kehrein's expert testimony as follows:

> Ms. Kehrein will testify regarding her expert opinion on the propriety of 'Loss Factor Adjustment' assessments by QST on invoices to Mervyn's and Target . . . . Ms. Kehrein will also testify that Clifford Kupperberg's damages calculations, including the calculations presented in Exhibit E to his Expert Report, use correct inputs and properly apply the various elements of customers' bills, including the "PX Credit," as well as defined terms and other provisions from the Agreements, including "energy charge" and "PX Subtractor," "Section 11," and "Section 13." Ms. Kehrein will also testify, again, based on her expertise and familiarity with industry custom and practice, that Mr. Kupperberg correctly accounted for the term "Competition Transition Charge."

Supp'l Ball Decl. Ex. C . In her Expert Report, Kehrein stated:

> I have been asked to give my opinion regarding the characteristics of the relationship between charges assessed to Customers by UDCs and ESPs in California after the passage of A.B. 1890, and relevant tariffs. This implicates the proper calculation of charges for electricity included in invoices from QST to Mervyn's and Target . . . . It is my opinion that QST improperly included what QST has referred to as a Loss Factor Adjustment ("LFA") or Distribution Loss Factor ("DLF") in its invoices to Mervyn's and Target.

Ball Decl. Ex. U at 1:26-2:18.

The Court is unpersuaded by Defendants' narrow characterization of Kehrein's expert testimony. In addition to offering testimony on the Loss Factor Adjustment ("LFA"), Kehrein is in effect offering her opinion on damages by attesting to the correctness of Kupperberg's damages calculations. Moreover, Kehrein conducted interviews and had discussions with Kupperberg. Kehrein provided Kupperberg with information pertaining to Defendants' damages calculations and offered Kupperberg advice regarding his methodology. See Kehrein Dep. at 69:9-79:12. Although she was deposed on her communications with Kupperberg about the reasonableness of amounts withheld by Mervyn's and Target, she testified unhelpfully that "I don't remember what he said, I don't remember how I responded." See Supp'l Ball Decl. Ex. B. at 186:16-187:4.

Furthermore, Kehrein broadened the scope of her expert testimony in her Supplemental Expert Report by challenging the Plaintiff's damages expert, Steven McClary. In her Supplemental Expert Report, Kehrein stated that:

> [i]f Mr. McClary is using the phrase "actual rates charged" to refer to anything other than the "Energy Charge" stated on bills from the utilities, then it is my opinion, based on my expertise and familiarity with the custom and practice in the energy industry, that

> Mr. McClary would be incorrect in doing so. In my opinion, Mr. Kupperberg's damages calculations . . . use correct inputs and properly apply the various elements of the customers'bills, including the "PX Credit" . . . . Furthermore . . . Mr. Kupperberg correctly accounted for the term "Competition Transition Charge."

Supp'l Ball Decl. Ex. A. By challenging the validity of Steven McClary's damages calculations, and offering her opinion as to how Defendants' damages should be appropriately calculated, Kehrein is also offering her own opinion with respect to Defendants' damages.

In short, Defendants attempt to have it both ways. On the one hand, they use Kehrein to give her own testimony on certain components of their damages, to help prepare and bolster the testimony of their other damages expert, Kupperberg, and to attack their opponents' damages expert. On the other hand, Defendants attempt to use the cloak of attorney-client privilege to conceal her communications with company officials and counsel related to damages, effectively denying their opponents highly relevant evidence for effective cross-examination when she testifies as an expert.

Defendants cannot have it both ways. Contrary to their assertion in their Expert Witness List that Kehrein's testimony is limited to her opinions regarding the LFA and the correctness of Kupperberg's calculations, Kehrein's testimony will likely disclose a significant portion of the confidential communications regarding Defendants' damages. Therefore, Defendants waived any attorney-client privilege that may have attached to Kehrein's communications regarding Defendants' damages.

3. Work Product Protection

Federal Rule of Civil Procedure 26 (b)(3) codifies the attorney work product doctrine:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation.

Fed. R. Civ. P. 26 (b)(3).

The threshold inquiry is whether the material was prepared in anticipation of litigation. Reavis v. Metropolitan Prop. & Liab. Ins. Co., 117 F.R.D. 160, 162 (S.D. Cal. 1987). If "but for" the litigation, the document would not have been prepared, then the document is work product; if the document was prepared in the ordinary course of business, regardless of any litigation, it is not work product. See, e.g.,

First Pac. Networks, Inc. v. Atlantic Mut. Ins. Co., 163 F.R.D. 574, 582 (N.D. Cal. 1995) (communications between client or its counsel and insurance carrier not protected when the documents would have been prepared independent of any litigation); Fox v. California Sierra Fin. Serv., 120 F.R.D. 520, 528-529 (N.D. Cal. 1988) (legal opinion letters regarding securities offering that defendant was required to provide not prepared in anticipation of litigation). While litigation need not have already commenced, "there must be more than a remote possibility of litigation." Conner Peripherals v. Western Digital Corp., 1993 WL 726815 at *4 (N.D. Cal. June 8, 1993). The protection applies "if the prospect of litigation is identifiable because of specific claims that have already arisen." Id. The test is whether "the document can fairly be said to have been prepared or obtained because of the prospect of litigation." Id. (citations omitted).

Here, Plaintiff seeks documents: 1) that were created by Kehrein at the request of Defendants' in-house counsel Williams; and 2) that embody Kehrein's communications to Defendants' in-house and outside counsel, as well as her communications to Defendants' employees. The first category of documents is comprised of analyses related to Defendants' damages in the event of Plaintiff's premature termination of the contracts. Kehrein created these documents at the behest of Williams so that Defendants could evaluate potential claims and defenses with respect to possible litigation with Plaintiff. See Williams Decl. ¶¶ 5, 6, 7, 8. Hence, "but for" the possibility of this litigation, Kehrein would not have created the documents in this first category.

The second category of documents, which consists of Kehrein's communications to Defendants' in-house and outside counsel, as well as Kehrein's communications to Defendants' employees, appear from the privilege log to focus on the requirements of the contracts at issue in this litigation and the consequences of Plaintiff's termination of those contracts. See Ball Decl. Ex. R. Many are undated, making it difficult to determine whether, "but for" the instant litigation which ensued as a result of a dispute over the contracts, the documents in the second category would not have been created.

In any event, the work product protection may be waived. "[A]bsent an extraordinary showing of unfairness that goes well beyond the interests generally protected by the work product doctrine, written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product." Intermedics, Inc. v. Venitrex, Inc., 139 F.R.D. 384, 387 (N.D. Cal. 1991).

Here, Defendants have made no unusual showing of unfairness so as to prevent discovery of these documents that otherwise would be protected by the work product doctrine. Therefore, Defendants waived any work production protection that may have attached to the documents at issue by designating Kehrein as an expert witness.

CONCLUSION

Accordingly, Plaintiff's Motion to Compel (docket no. 94) is GRANTED. In accordance with this Order, Defendants must produce the documents sought by Plaintiff, no later than May 21, 2001.

IT IS SO ORDERED.

Dated: _____

_____

ELIZABETH D. LAPORTE
United States Magistrate Judge

copies faxed to
parties of record